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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 212.

HURON HOLDING CORPORATION and NATIONAL SURETY CORPORATION,

Petitioners,

—against—

LINCOLN MINE OPERATING COMPANY,

Respondent.

BRIEF FOR PETITIONERS.

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THE COURT PRESS, N. Y. C.

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Opinions of the Courts Below.

In an action by Lincoln Mine Operating Company against Huron Holding Corporation, the plaintiff (respondent here) obtained judgment on March 3, 1938 in the District Court for the District of Idaho, Southern Division, which was affirmed by the Circuit Court of Appeals on February 7, 1939, in an opinion reported in 101 Fed. (2d) at page 458.

Thereafter, on defendant's motion to satisfy said judgment, and on plaintiff's motion for judgment against the surety on appeal bond after remand, the District Court rendered an opinion in favor of the defendant and the surety (petitioners here), which is reported in 27 Fed. Supp. at page 720.

The opinion of the Circuit Court of Appeals for the Ninth Circuit here under review, reversed the

District Court, and is reported in 111 Fed. (2d) at page 438. It is also found at pages 74 to 78 of the present Record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [43 Stat. 938; 28 U. S. C. A., Sec. 347(a)].

Judgment of the Circuit Court of Appeals, reversing the judgments of the District Court, was entered April 30, 1940 (R. 79). An order staying the issuance of mandate until July 6th, 1940, was filed in the Circuit Court of Appeals on June 4, 1940 (R. 80). Petition for certiorari was filed in this Court on July 5th, 1940, and certiorari granted on October 14, 1940.

Nature of the Case.

This case involves the right of a State, pursuant to its own laws and rules of decision, to attach a debt, owed by one of its citizens to a nonresident, and evidenced by a judgment theretofore obtained by the nonresident against the citizen in a Federal Court sitting in another State. It also involves the right of the State Court to enforce payment of the debt so attached, by process against the citizen, for the benefit of the domestic creditors of the nonresident; and the right of the citizen, after having made such payment pursuant to valid process in the State Court, to claim and obtain satisfaction of said judgment in the Federal Court where rendered.

Parties.

The parties to the proceedings out of which this case arose are:

HURON HOLDING CORPORATION (hereinafter called "Huron"), a New York corporation (R. 48), one of the petitioners;

NATIONAL SURETY CORPORATION (hereinafter called "Surety Company"), a New York corporation (R. 4), the other petitioner;

LINCOLN MINE OPERATING COMPANY (hereinafter called "Lincoln"), an Idaho corporation, not doing business in the State of New York (R. 20), the respondent;

MANUFACTURERS TRUST COMPANY (hereinafter called the "Trust Company"), a New York corporation (R. 17-18), plaintiff in the New York action, but not a party to this review.

Facts.

On March 3, 1938, the respondent Lincoln obtained a judgment against Huron in the District Court of the United States for the District of Idaho (hereinafter called the "District Court"), in a statutory action for detention of personal property in the amount of $6,730.70, and $79.42 costs (R. 1-2). Huron appealed on May 31st, 1938 (R. 3-4), to the United States Circuit Court of Appeals for the Ninth Circuit (hereinafter called the "Circuit Court"). Pursuant to the terms of the order allowing the appeal (R. 3-4), a supersedeas appeal bond executed by the petitioner Surety Company, was approved and filed on May 31st, 1938 (R. 4-6).

Thereafter, on June 28, 1938, during the pendency of said appeal, the Trust Company began an action in the Supreme Court of the State of New York, County of New York (hereinafter called the "State Court"), against Lincoln on an unpaid promissory note for the sum of $10,000 and interest (R. 17 *et seq.*). A warrant of attachment was duly issued out of the State Court on July 12th, 1938 (R. 24-25, 19), pursuant to the provisions of Sections 902, *et seq.* (and other applicable provisions), of the New York Civil Practice Act, set forth in an Appendix, annexed to this brief, at pages 49 *et seq.*

On July 12th, 1938, the Sheriff made a levy (R. 29-30) under said warrant of attachment upon Lincoln's judgment against Huron (Civil Practice Act, §917, par. 3; Appendix, p. 54). In answer to said levy, Huron filed its certificate dated July 15, 1938 (R. 30-31), as it was required to do (Civil Practice Act, §918; Appendix, p. 55), acknowledging that Lincoln had obtained said judgment of March 3, 1938, against Huron for $6,730.70 and interest, and that said judgment was unpaid, "subject to our rights on the appeal taken by us from said judgment" (R. 30-31). An inventory of the property attached (R. 26-27) was made on July 22, 1938, as the statute provided (Civil Practice Act, §921; Appendix, p. 55).

On July 23, 1938, the summons and complaint in the State Court action were personally served upon Lincoln in Boise, by the Idaho Sheriff (R. 20-21), in accordance with the provisions of the New York statute (Civil Practice Act, §§233 and 235; Appendix, p. 49).

Lincoln did not appear either generally or specially, or move or make answer to the complaint in the State Court.

On January 27th, 1939, the attorneys for Lincoln

served and filed in the District Court a notice of their lien in the agreed sum of 33⅓% of the recovery against Huron and costs (R. 8-9), pursuant to Idaho Law (R. bottom p. 75).

Huron's appeal from the District Court judgment of March 3, 1938 (R. 1-2), was heard by the Circuit Court on February 3, 1939 (R. 7) and judgment was affirmed on February 7, 1939 (R. 8).

The Trust Company moved for judgment in the State Court action on February 25, 1939 (R. 21-23). Judgment was entered against Lincoln on February 27th, 1939, for $15,842.02 (R. 23). Execution was then issued to the New York County Sheriff on February 28, 1939 (R. 27-28), directed against the property theretofore attached, *i. e.,* Huron's judgment debt to Lincoln (R. 28).

Under the State Court warrant of attachment, judgment and execution, the Sheriff thus collected from Huron on March 1, 1939, the sum of $4,805.55 or two-thirds of the amount due on the District Court judgment (R. 31, 29 and 57). On March 8, 1939, Huron paid Lincoln's attorneys the sum of $2,747.27, in full satisfaction of their lien (R. 32-33). Receipt of this payment, and *pro tanto* satisfaction of the judgment of March 3, 1938, was acknowledged in writing by Lincoln's attorneys (R. 32-33). Huron's right to prove that the remainder of said judgment had been otherwise paid, was reserved in said receipt (R. 33).

The sum of these two payments by Huron ($4,805.55 to the Sheriff in New York, and $2,747.27 to Lincoln's attorneys in Idaho) was in excess of the District Court judgment of March 3, 1938.

The mandate of the Circuit Court upon its affirmance of the judgment of March 3, 1938, was filed in

the District Court on March 13, 1939 (R. 6-8). Huron then moved in the District Court for satisfaction of the judgment (R. 9-33), alleging its payments of the lien and of the attachment, above described. This motion was amended by Huron on March 29, 1939 (R. 42-44). Lincoln filed no answer to this motion.

On March 14, 1939, Lincoln made a counter-motion, for judgment against the Surety Company on its appeal bond (R. 33-35). To this motion, the Surety Company filed its answer on March 22, 1939 (R. 35-42), and thereafter an amended answer (R. 44-45), alleging substantially the same facts as Huron.

These two motions were heard together by the District Court and decided on May 4th, 1939, in favor of petitioners. The District Court decided that the judgment of March 3, 1938, was satisfied by virtue of the payments made by Huron in the New York attachment proceedings, and in Idaho to Lincoln's attorneys. The District Court likewise said in its opinion (27 Fed. Supp. 720), that the judgment having been paid, there was no independent liability on the Surety Company. Formal findings of fact and conclusions of law were prepared and filed in each motion (R. 46-60). Separate judgments were entered (R. 61-62).

From these judgments, one satisfying the District Court judgment of record, and the other denying judgment against the Surety Company, Lincoln appealed to the Circuit Court on August 3, 1939 (R. 62-63).

The Circuit Court reversed the two District Court judgments on April 30, 1940 (R. 73-79), with an opinion (R. 74-78; also 111 Fed. (2d) 438), deciding in effect that Huron's payment pursuant to the State Court attachment, was not entitled to be regarded (in the federal court) as in satisfaction of the judgment attached (R. 78).

Questions Involved.

The questions presented in this case are:

I. Was the Idaho District Court required to recognize and give effect to the attachment proceedings which in all respects complied with and were fully authorized by the laws and decisions of the State of New York?

II. Has *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, changed the rule that a federal judgment may not be attached in a foreign jurisdiction?

Specification of Errors to Be Urged.

Petitioners assign as error:

1. The refusal of the Circuit Court to recognize and give effect to the attachment proceedings which complied with and were fully authorized by the laws and decisions of the State of New York, thus subjecting Huron to liability for double payment of the same debt.

2. The determination by the Circuit Court that the attachment proceedings did not give jurisdiction to the Supreme Court of the State of New York, in the action brought against Lincoln by the Trust Company in New York.

3. The determination by the Circuit Court that the decision of this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, is not applicable to the case at bar, and did not require that the validity of the State Court attachment be adjudged in accordance with the state law.

Summary of Argument.

POINT I.

The New York Court had power to enforce its attachment proceedings against Huron, a New York corporation, and on that power was based its jurisdiction to bind the non-resident judgment creditor, Lincoln, to the extent of Lincoln's interest in the judgment debt attached.

Huron is a New York corporation, and at all times subject to the laws and judicial processes of that State.

As Mr. Justice Holmes said in *McDonald* v. *Mabee,* 243 U. S. 90, "the foundation of jurisdiction is physical power, * * * (p. 91).

The power of a State over the property and persons within its boundaries, is the basis of the State's right to subject such property, and the obligations of such persons, to the claims of the domestic creditors of a nonresident owner or obligee. The constitutional limitations imposed upon this right are dealt with in *Pennoyer* v. *Neff,* 95 U. S. 714. In that case it was established that principles of due process require that the nonresident defendant be given notice of the proceedings against him. Unless the defendant be served within the jurisdiction, or voluntarily appear, the attaching court has no jurisdiction to grant a personal judgment against him, and can only dispose of the property attached.

In deciding *Pennoyer* v. *Neff,* this Court approved of the principle that a State could and should exercise its just powers over persons and property within its borders for the protection of its citizens and the en-

forcement of their rights against nonresidents, saying at page 723:

> "But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a State affecting persons resident or property situated elsewhere, no objection can be justly taken; * * *
>
> So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens."

In the *Pennoyer* case, this Court was concerned with the seizure of tangible property. The principles invoked are equally applicable to the attachment of debts and causes of action. Where a debt is attached, however, the jurisdiction of the attaching Court is founded upon the State's power over "persons" rather than "property" within its territory. The attachment of a debt, therefore, is not altogether the same as the attachment of property. The procedure is similar, but there is a point beyond which the

analogy cannot be carried. The action ceases to be really *in rem*, at least so far as the garnishee is concerned. The attachment of a debt becomes in essence (if not in procedure) a personal action against the garnished debtor, who must be found in the jurisdiction, but (under the *Pennoyer* rule) with notice to the nonresident creditor or "owner" of the debt (which takes the place of a *res*), in order to give him an opportunity to protect his interest in the obligation attached. See *Harris* v. *Balk*, 198 U. S. 215, 222, 223.

Any misapprehension there may have been as to the nature or "situs" of a debt in an attachment proceedings, was dispelled by this Court in *Chicago, Rock Island & Pacific Railway Company* v. *Sturm*, 174 U. S. 710. In that case, this Court again recognized the salutary nature of attachment remedies as a necessary means of subjecting the foreign creditor's assets "to the payment of *his* creditors" (p. 716). An attached debt was involved, and it was held that the idea of situs was "somewhat artificial" in that context. Jurisdiction to attach a debt arises from the power of the court over the person of the debtor. Reasons for this broad principle were given at pages 715, 716:

> "The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is

due and might be paid to a nonresident to the defeat of his creditors. To do it you must go to the domicil of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res,* and gives character to the action as one in the nature of a proceeding *in rem. Mooney* v. *Buford & George Mfg. Co.* [34 U. S. App. 581] 72 Fed. Rep. 32; Conflict of Laws, sec. 549, and notes.

"To ignore this is to give immunity to debts owed to nonresident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of *his* creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us."

The facts here fully satisfy the requirements of the *Pennoyer* case as to due process. The jurisdiction

and power of the New York Court to enforce its process against Huron the judgment debtor, seem to be unquestionable, within the rule and authority of the *Sturm* case.

The next question is whether the attachment proceedings were authorized by the law of New York.

POINT II.

The State Court proceedings were regular in form, and fully authorized by the statutes and decided law of the State of New York.

(a) The procedural regularity of the State Court attachment, judgment and execution, was found below as a fact, and is admitted by respondent.

The pertinent Statutes are annexed to this brief in an Appendix, at pages 49 *et seq.*

When Huron moved in the District Court for an order adjudging the judgment satisfied, it fully recited the various steps taken in the State Court attachment proceedings (R. 9-16), and annexed to its motion papers a full set of the papers used in those proceedings (R. 17-33). No answer to the motion was filed by Lincoln.

The District Court specifically found that the documents submitted were "duly certified" (R. 59). It also found as a fact that the—

> "proceedings [in the State Court], as heretofore set forth, were within its jurisdiction, and valid and * * * that the matters of fact set forth in the exhibits and affidavits of the defendant [Huron] are true" (R. 59).

This finding was not disturbed by the Circuit Court.

Furthermore, respondent concedes procedural regularity (Brief in opposition to Petition, middle p. 4), and the subject is thus withdrawn from review here.

(b) The law of New York authorized the attachment of a debt evidenced by a judgment obtained in a federal court in another state.

The New York courts construe the New York attachment statutes to mean that debts evidenced by judgments, whether local or foreign, may be attached by levy upon the debtor, in the same way as any other debt. This was decided in—

> *Shipman Coal Company* v. *Delaware & Hudson Company and Nahas* (1st Dept. 1927), 219 App. Div. 312; aff'd without opinion, 245 N. Y. 567.

In that case, the Shipman Coal Company filed an action in the New York Supreme Court against the Delaware & Hudson Company, a New York corporation, and also against two brothers named Nahas who were residents of Pennsylvania. Jurisdiction was obtained over the Nahas defendants by serving Delaware & Hudson with notice of attachment, levying upon two unsatisfied judgments theretofore recovered by the nonresidents Nahas in two tort actions by them against the Delaware & Hudson Company, in the United States District Court for the Eastern District of Pennsylvania. The nonresidents Nahas, *appearing specially,* moved to vacate the levies on the ground:

> "* * * that, as the situs of the debts, to wit, the judgments levied upon, was not within the State, such judgments were not property here, effective

to confer jurisdiction upon the court in this State" (219 App. Div. at p. 314).

The lower court vacated the levies of attachment. But, on appeal to the Appellate Division, the vacating orders were reversed. This reversal was sustained, without opinion, by a unanimous Court of Appeals of which Mr. Justice Cardozo was Chief Judge (245 N. Y. 567). In the opinion of the Appellate Division, per McAvoy, *J.*, it is said (219 App. Div., pp. 314-315):

"* * * In this state a judgment debt is property subject to attachment within the meaning of the attachment statute. This is precisely held in 84 N. Y. 1, *Matter of Flandrow*, where it was written:

"'It * * * cannot be doubted that a judgment is, within the meaning of the Code, property subject to attachment, and of the kind incapable of manual delivery. It is an award of the court that the plaintiff recover a sum of money; and thereby a legal obligation arises on the part of the defendant to pay it. But although it is said to be a contract or debt, or obligation of record, it cannot be said to be held or to be in the possession of anyone. The clerk, as an officer of the court, keeps the record, but does not "hold" the judgment. * * * From the very nature of the obligation it follows, that the only way to subject a judgment to attachment for the payment of a debt of the plaintiff therein is to serve the warrant upon the debtor, the person against whom the judgment was recovered.'

> "* * * The sole question then is whether the debt has its situs or is 'found', for purposes of attachment, within this state. Since the judgment, even though recovered in another court, represents a cause of action, debt, or demand, and it is not an 'instrument for the payment of money' within Section 916, Civil Practice Act, it ought to be treated in all respects like any other debt, chose in action, or intangible personal property."

The court expressly repudiated any power or intent to extend its control beyond its jurisdictional boundaries, saying at page 315:

> "It would not seem to constitute an unwarranted extension of the attachment statutes or any interference with the jurisdiction of other courts, or lack of comity toward them, or be any infringement of public law between the states, to hold that a judgment debt has no fixed situs at the locality of the court in which it was established."

In this position the State Court is fully upheld by this Court's opinion in *Harris* v. *Balk, supra,* pages 222, 223:

> "We do not see the materiality of the expression 'situs of the debt', when used in connection with attachment proceedings. If by situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the situs thus fixed, we think it plainly untrue. * * * It is nothing but the obligation to pay which is garnished or attached. This obligation can be en-

forced by the courts of the foreign state after personal service of process therein, just as well as by the courts of the domicil of the debtor. If the debtor leave the foreign state without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other state where the debtor might be found. In such case the situs is unimportant. It is not a question of possession in the foreign state, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of."

To the same effect, see:

Chicago, etc. v. *Sturm, supra.*

The *Shipman* opinion makes it clear that the thing attached is the debt or cause of action evidenced by the judgment of the foreign court. The foreign judgment is given effect as proof of the debt. Unless this is kept in mind, it is possible to fall into some confusion as to the nature of the New York attachment. It is sometimes referred to as an "attachment of a foreign judgment". This is a convenient but elliptical phrase, and is not to be understood as implying that the attachment process impounds the foreign decree itself, regarded as a *thing,* or attempts to interfere with it or give it extra-territorial effect.

Attachment proceedings in New York, as elsewhere, are commonly regarded as proceedings *in rem.* Where tangible property is attached, the proceeding is literally *in rem.* But where a debt is attached, characterization of the action as *in rem* is at most an apt figure of speech, so far as the garnishee is concerned. (See

Harris v. *Balk,* quoted *supra.*) The phrase *in rem* is then chiefly useful as a category to define the limited effect to be given to the judgment, if the nonresident defendant does not appear in the action. The *res* is the personal obligation of the debtor-garnishee, or, phrased more exactly, the right of the nonresident creditor to enforce payment of that obligation in the State where the attachment takes place (the domicile of the debtor, see *Williams* v. *Ingersoll,* 89 N. Y. 508, 524). As to that, the nonresident creditor is bound by the attachment, after being given due notice, but the jurisdiction of the attaching court can extend no further, and the New York courts in the *Shipman* case emphasize the fact that they claim no further power.

The opinion of the Appellate Division is firmly based upon principles of New York law expounded in numerous leading cases:

Matter of Flandrow, 84 N. Y. 1, as quoted in the *Shipman* opinion, *supra;*

Wehle v. *Conner,* 83 N. Y. 231, holding that an attachment of a judgment did not interfere with the valid processes of the court granting the judgment (at p. 238), and that since such an attachment fell within the terms of the attachment statutes, it was not within the province of the courts to nullify the legislative policy therein expressed (at p. 237); see also prior decisions in the same litigation, reported at 69 N. Y. 546, and 75 N. Y. 585;

Gutta Percha Mfg. Co. v. *The Mayor,* 108 N. Y. 276, in which it was held, following

the *Nazro* case, *infra,* that a judgment, either foreign or domestic, was to be treated as a contract within the meaning of the attachment statutes, and created a debtor and creditor relationship, whether the original liability, on which the judgment was obtained, lay in contract or in tort;

Dunlop v. *Patterson Fire Ins. Co.*, 74 N. Y. 145, cited in the *Wehle* case, *supra,* holding that money in hands of an officer of the court may be attached; that the attachment effects a transfer of interest by operation of law and does not constitute an interference with the court;

National Broadway Bank v. *Sampson,* 179 N. Y. 213, quoted and followed in the *Shipman* opinion, which held that the jurisdiction of the court to attach a debt rests solely upon the power to reach the debtor and subject him to the mandate of the court. The *Flandrow* case, *supra,* applied the same rule to judgment debts;

Nazro v. *McCalmont Oil Co.,* 36 Hun 296, ruling that a judgment is a contract, express or implied, within the meaning of the attachment statutes; followed in *Gutta Percha Mfg. Co.* v. *The Mayor, etc., supra.*

It will be noted that the *Shipman* decision is precisely within the policy and "necessity" of the rule laid down by this Court in *Chicago etc.* v. *Sturm, supra,* in which the jurisdiction of the state courts to attach debts at the domicile of the debtor was confirmed. Compare *Harris* v. *Balk, supra,* and see

40 Harv. Law Rev. 1153 (1927), where the *Shipman* decision is described as "a logical extension" of the rules stated by this Court in *Harris* v. *Balk*. See also comment on the *Shipman* case in 11 Minn. L. Rev. 654-5 (1927).

Respondent has sought to distinguish the instant attachment from that approved by the New York Court of Appeals in *Shipman* v. *Delaware & Hudson*, by pointing out that Huron paid the judgment of March 3, 1938, before the mandate of the Circuit Court had been filed in the District Court. But the same situation existed in the *Shipman* case, and was urged by defendants-appellant in their brief to the Court of Appeals (pp. 10-12). The following appeared at page 10 of the *Nahas* brief:

> "*The judgments did not become final until August 30th, 1926,* when the mandate of affirmance was issued. Certainly no cause of action could possibly vest in any one prior to that date. The judgments were unenforcible prior to August 30th, 1926, hence, no cause of action can exist upon an unenforcible judgment. On August 13th, 1926, the levy was made (fols. ~~264~~, 205, 208, 212). *At the time of the levy no attachable cause of action was in existence,* therefore the sheriff did not 'find' a cause of action 'within the County of New York' when he levied." (Italics in original.)

Their brief (p. 10) also pointed out (with references to the record) that a motion for reargument of the appeal was pending undetermined in the Circuit Court of Appeals for the Third Circuit when the New York levy was made. But the Court of Appeals affirmed the Appellate Division and sustained the

validity of the attachment, thus overruling the objections of the defendants (appearing specially) based upon the pendency of appeal and lack of mandate at the time of the attachment.

Thus the *Shipman* case is an exact precedent supporting the validity of the State Court proceedings in the present case. The District Court so found and in this was supported by the Circuit Court.

(c) The money judgment in the District Court was an adjudication of Huron's debt to Lincoln and remained binding upon both parties during appeal; although execution was stayed in the District Court, the judgment was not vacated, and could be sued upon in a foreign court.

Both the District Court and the Circuit Court have concurred in this view. The District Court said, 27 Fed. Supp. 720 (at pp. 723-4):

> "As to the further contention of the Lincoln Mines Operating Company that there was not a good attachment in New York, upon which jurisdiction must depend, for the reason that the debt attached was not then owing and that there was no certainty at the time of the attachment that any debt would ever be owing, as the case in which the Idaho judgment was entered was on appeal to the Circuit Court of Appeals and that any attempt to attach the Idaho judgment under such circumstances became a nullity, brings us to the question as to whether a judgment stands binding upon the parties until reversed, while an appeal from it is pending. The giving of a supersedeas bond only stayed enforcement of the judgment while the appeal was pending and

did not change the judgment nor change the debt evidenced by it, or vacate it. (Citations.)

The fact that an appeal was taken and the Idaho judgment was affirmed did not, during the pendency of the appeal, change the nature of the debt evidenced by the judgment. *Titus* v. *Wallick,* 59 S. Ct. 557, 83 L. Ed. * * *, decided February 27, 1939 (not yet reported in U. S. reports). And such judgment was subject to attachment." (Note: *Titus* v. *Wallick* is now reported at 306 U. S. 282.)

The Circuit Court of Appeals below dealt with the same point in a short paragraph (111 Fed. (2d) 438, at pp. 439-440; R. 77):

"So far as Lincoln's claim of the invalidity of the New York attachment of a federal or any other foreign judgment is based on the contention that a judgment of a trial court ceases to be final when on appeal, it cannot be sustained. *Deposit Bank* v. *Frankfort,* 191 U. S. 499, 511. Supersedeas simply stays execution of the judgment but does not change its final quality."

Since the District Court and the Circuit Court below were dealing with the legal effect of their own judgment, their concurrent views on the subject must necessarily be given considerable weight. They undoubtedly gave effect to the rule established in the federal courts, as shown by the following decisions:

Roberts v. *Anderson* (C. C. A. 10th), 66 Fed. (2d) 874, at p. 875;

Cohen v. *Superior Oil Co.,* 16 Fed. Supp. 221, aff'd (C. C. A. 3rd) 90 Fed. (2d) 810;

Emery v. *United States* (D. C. W. Penn.), 27 Fed. (2d) 992;
DuPont etc. v. *Richmond Guano Co.* (C. C. A. 4th), 297 Fed. 580;
Deposit Bank v. *Board of Councilmen of Frankfort*, 191 U. S. 499;
Ransom v. *City of Pierre* (C. C. A. 8th), 101 Fed. 665;
K. P. Railway Co. v. *Twombly*, 100 U. S. 78;
Read v. *Allen*, 286 U. S. 191;
Walz v. *Agricultural Ins. Co.* (E. D. Mich.), 282 Fed. 646, 649;
Straus v. *American Publishers Association* (C. C. A. 2d), 201 Fed. 306, 310;
United States ex rel. Coffman v. *Norfolk & Western Railway* (S. D. W. Va.), 114 Fed. 682, 685.

The above decisions, while not exhaustive, are a fair indication of the uniformity with which the United States courts have said that neither appeal nor stay of execution have the effect of vacating a judgment or suspending its operation as an adjudication between the parties which may be pleaded in another court.

Two states, California and Oklahoma, have adopted a different rule, apparently as a matter of statutory interpretation. The Supreme Court of California, interpreting a specific state statute, decided in *Jennings* v. *Ward* (1931), 114 Cal. A. 536, 537:

> "It is the settled rule in California, though the weight of authority in other jurisdictions is to the contrary, that judgment is not final so long as an appeal is pending therefrom, even though a *supersedeas* bond has not been furnished."

The California Statute which was interpreted by the California court to compel the above result, is found in Section 1049 of the California Code of Civil Procedure which reads in part as follows:

> "Sec. 1049. An action is deemed to be pending from the time of its commencement until its final determination upon appeal, * * *."

The Oklahoma courts follow the California rule:

> *Tulsa* v. *Wells,* 79 Okla. 39, 191 P. 186; and see
>
> *Coppedge* v. *Clinton,* 72 Fed. (2d) 531, applying the Oklahoma rule when a judgment of that state was offered in a federal court.

But Compare:

> *Cohen* v. *Superior Oil Co., supra,* where the *Coppedge* decision was criticized (at p. 226).

The statute in Idaho (Idaho Code Ann., §12-606) is the same as the California statute above quoted. So are the statutes in Oregon and South Dakota. But the Oregon courts do not construe the statute as depriving a judgment of finality pending appeal, *Day* v. *Holland,* 15 Or. 464, 468, 469. Nor will such a statute be so construed in the federal courts, unless compelled by the decisions of the local courts. Thus the leading case of *Ransom* v. *City of Pierre* (C. C. A. 8th), 101 Fed. 665, involved a South Dakota judgment, on appeal and stayed by supersedeas bond, and the interpretation that should be given to the South Dakota statute (exactly like the California statute above quoted) in the absence of controlling state decision. The court ruled, at page 669:

> "In many cases the question has been mooted

whether, when a writ of error has been sued out, or when an appeal has been taken which operates essentially as a writ of error, to review a judgment at *nisi prius*, and a supersedeas bond has been given to stay proceedings, such a judgment may be received in evidence in another suit between the same parties in support of the plea of *res adjudicata;* and, while the decisions upon this question have not been uniform, yet, in our judgment, the weight of judicial opinion, as well as sound reason, is that, when a case which is removed to an appellate court by a writ of error or an appeal is not there tried *de novo,* but the record made below is simply re-examined, and the judgment either reversed or affirmed, such an appeal or writ of error does not vacate the judgment below, or prevent it from being pleaded and given in evidence as an estoppel upon issues which were tried and determined, unless some local statute provides that it shall not be so used pending the appeal. A supersedeas bond merely operates to stay an execution or other final process on the judgment. It does not vacate the judgment, nor prevent either party thereto from invoking it as an estoppel."

The general acceptance of the principles above stated by the text book writers is also of importance. We call attention to:

3 American Jurisprudence, under title "Appeal & Error", Secs. 525 and 526. In the latter Section, the following statement appears:

"The rule that where an appeal or writ of error does not vacate or suspend the original judgment, an action may be maintained thereon

in the courts of another state, is uniformly recognized. And where, in the state where the judgment was rendered, a supersedeas bond given in proceedings in error serves the purpose of staying the execution of the judgment only, and is no obstacle in the way of another action on the judgment, an action is maintainable thereon in the courts of another state. * * *"

3 Moore's Federal Practice, 3300, where it is said:

"While supersedeas stops any future executions on the specific judgment appealed from, it does not suspend the operation of the judgment as an estoppel nor does it preclude the bringing of other actions."

8 Hughes on Federal Practice, Secs. 5511 and 5512. In the latter Section, at page 80, it is stated that—

"* * * an appeal, where a supersedeas is obtained, does not preclude the parties from prosecuting collateral or independent proceedings,"

citing *Lee* v. *Jackson Light & Traction Co.* (C. C. A. 5th), 261 Fed. 721, to the effect that neither appeal nor supersedeas prevents valid garnishment proceedings under a judgment (*8 Hughes,* p. 81, n. 28).

5 American Law Reports, 1269, where the prevailing rule on this branch of the law is summarized as follows:

"* * * If an action may be maintained on such judgment, notwithstanding the appeal or writ of error, in the state in which it was rendered, even though the issuance of execution thereon be

stayed, it may be maintained in any other state; although if execution has been stayed in the state where the original judgment was rendered, the court in which suit is brought thereon will ordinarily also stay execution pending the determination of the appeal.

The rule that where an appeal or writ of error does not vacate or suspend the original judgment, an action may be maintained thereon in the courts of another state, is uniformly recognized."

As pointed out in Robertson & Kirkham on *"The Jurisdiction of the Supreme Court of the United States"* (1936 Ed.), at page 2, note 5:

> "The Conformity Act (28 U. S. C. A. Sec. 724, R. S. Sec. 914) does not apply to appellate proceedings in the federal courts, and state forms of practice and procedure do not affect these proceedings [citations]."

A fortiori, the legal effect of appeal upon a federal judgment is a matter of distinctly federal concern, unaffected by local rule or statute.

We submit that the vitality of the rule that a federal judgment is binding until reversed, is amply illustrated by the above citations and authorities. The finality of the District Court judgment in favor of Lincoln against Huron, therefore, was not disturbed by appeal or stay of execution. That judgment remained an adjudication and estoppel between the parties until reversed, and its availability as the basis of an action, or as evidence of an attachable debt in New York, is thus fully established.

POINT III.

The Circuit Court's failure to judge the validity of the State Court attachment in accordance with the state law, and its application of a general federal rule instead, is contrary to the principles laid down by this Court in *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64.

The Circuit Court, after indicating in its opinion (R. 77) that there were a number of decisions in the federal courts to the effect that federal judgments were not subject to garnishment in foreign jurisdictions, said (R. 78):

> "The district court below holds these decisions not applicable because of *Erie Railway Company* v. *Tompkins,* 304 U. S. 64. That decision it contends makes the validity of the attachment of the Idaho federal judgment determinable by the law of New York, which is claimed to be that the attachment is valid. That is to say, it resolves the conflict of laws controlling the two courts in favor of that of the attaching court. The Supreme Court holds the contrary."

In other words, the Circuit Court decided that the validity of the attachment in the State Court was to be determined by federal law and not by the law of the state where the attachment took place. The conflict between the "two courts" (state and federal) is thus, clearly, not a "conflict of laws" but a conflict of decision, which the Circuit Court held should be resolved in favor of the general federal rule.

The Circuit Court in the next paragraph of its opinion said (R. 78):

> "Obviously the specific question here is not one of mere local state law * * *."

The Circuit Court thus indicated that it relied upon the distinction between "state laws strictly local" and "questions of a more general nature", announced by Mr. Justice Story in the historic case of *Swift* v. *Tyson,* 16 Pet. 1, 18. That distinction long dominated the course of decision in this Court and in the federal courts generally, but was finally abolished in *Erie* v. *Tompkins.*

It should be stated at the outset, however, that it seems doubtful whether the distinction between local and general matters was properly made in this case, even under the doctrine of *Swift* v. *Tyson.* We have in mind the definite statement of this Court in *Harris* v. *Balk, supra,* at page 222:

> "Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there."

And the Court went on to say in terms that the converse is true. The New York law of attachments is found in the local statutes (Appendix), as well as in the decisions of the state courts interpreting those statutes. Although it is said that "attachment laws had their origin in the custom of London" (*Chicago etc.* v. *Sturm, supra,* 714-715), the New York statutes have been held to be in derogation of the common law, *Penoyar* v. *Kelsey,* 150 N. Y. 77. Even if they were declaratory of the common law, there would still be no room for the application of "general" common-law principles, even under *Swift* v. *Tyson,* because the meaning and effect of the statutes have been settled by the state courts. As this Court said in *Burns Mortgage Co.* v. *Fried,* 292 U. S. 487 at pages 493, 494:

> "The applicable state statute furnishes the

rule of decision for a federal court sitting in the state or outside its borders. And in that court the law must be given the meaning and effect attributed to it by the highest court of the state, as if the state court's decision were literally incorporated into the enactment, whatever the federal tribunal's opinion as to the correctness of the state court's views."

It may be inevitable in our federal system, comprising many coordinate jurisdictions, that conflicts or differences of decision should arise. But such conflicts were particularly acute between the federal and the state courts so long as the decision in *Swift* v. *Tyson, supra,* remained as the authoritative construction of Section 34 of the Federal Judiciary Act of September 24, 1789 (28 U. S. C. A., Sec. 725), and thus gave sanction to the enforcement of a body of "general law" in the federal courts, often at variance with the law applied by the courts of the several states.

It was the salutary purpose and effect of the decision in *Erie* v. *Tompkins,* overruling *Swift* v. *Tyson,* to establish a general principle in our jurisprudence that would abolish such conflicts between state and federal courts. The power to formulate and enforce general rules of substantive law, contrary to the express rules of decision in the several states, if it ever existed, has been renounced by the federal courts, and it is now recognized, as stated by Mr. Justice Holmes, in *Black and White Taxicab* v. *Brown and Yellow Taxicab,* 276 U. S. 518 at page 535, that

"the authority and only authority is the state and if that be so, the voice adopted by the state

> as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word." (Quoted in *Erie* v. *Tompkins,* at p. 79.)

Examining the authorities referred to in the opinion of the Circuit Court (R. 77) quoted above, we find that the early decisions in the federal courts followed the rule adopted in many (but not all) of the state courts, to the effect that judgments were not subject to attachment in a foreign jurisdiction. See *Drake on Attachments* (6th Ed. 1885) Sections 620-625. The adherence to such a rule by the federal courts was not unnatural; it was the "majority rule". It is noteworthy, however, that the federal courts were more or less *hors de combat* in this field, since they themselves, in the absence of federal statute authorizing it, did not take jurisdiction over the property of non-appearing defendants by means of attachment proceedings (*Labard* v. *Ubarri,* 214 U. S. 173; *Big Vein Coal Co.* v. *Read,* 229 U. S. 31, and many earlier cases).

Insofar as the decisions cited by the Circuit Court applied state law in accordance with the statutes and decisions of the states affected, their rulings as to the effect of attachments are not subject to criticism; for example, *Franklin* v. *Ward,* 9 Fed. Cases 711 (C. C. R. I. 1822), where Circuit Judge Story was called upon to interpret the Rhode Island law.

Also in *Thomas* v. *Wooldridge,* 23 Fed. Cases 986 (C. C. S. D. Mo. 1875), Bradley, Circuit Judge, at page 987, said:

> "The question in this case is whether a judgment of this court may be attached by process

issued out of a state court against the plaintiff in the judgment. The general rule applicable to foreign judgments by the Custom of London (from which our attachment laws are derived) is, that a debt of record in a superior court and even a debt in suit, cannot be attached. Different reasons have been assigned, namely, that a record is of too high a nature to be attached; that it is against the dignity of the court to be thus interfered with; that the debt is *quasi in custodia legis,* and that the party has no opportunity to plead the attachment. [Citations.] But whatever might have been the ground of the rule, it has been adhered to in many of the states, although not in all. [Citation.] The question is made to depend somewhat on the statutes of the particular states."

It should be noted that Judge Bradley recognized that the question before him depended "somewhat on the statutes of the particular states". To this statement would now be added, since *Erie* v. *Tompkins,* "and upon the decisions of the particular state" and the word "somewhat" would be omitted. He was, in that case, dealing with the laws of Mississippi. Our attachment arose under the laws (and decisions) of New York, where, as shown in the *Shipman* opinion, the common-law and historic reasons given in Judge Bradley's decision, although not overlooked, have been rejected as contrary to legislative intent and realistic analysis.

By the time *Henry* v. *Gold Park Mining Co.,* 15 Fed. 649 (cited by the Circuit Court, R. 77), came to be decided, the federal rule regarding attachments was firmly fixed in the minds of the federal judges,

particularly in view of the decision of this Court in *Wallace* v. *McConnell,* 13 Pet. 136, 151 (1839), which they deemed to be controlling.

In *Wallace* v. *McConnell, supra,* the question was a limited one, namely, whether a district court having before it an action to enforce a debt, should abate the action on the plea of defendant, because the debt in suit had been attached in a state court. The defendant had not paid the debt in the state court or anywhere else. This Court ruled that the plea of abatement was bad and that the case should proceed to judgment in the federal court. It was not there decided, however, that the proceeding in the state court could not continue in accordance with the state law or that its determination would be of no effect in the federal court if it did. That issue was not before this Court. (*Cf. Kline* v. *Burke Construction Co.,* 260 U. S. 226.) Nor was a valid state court attachment (and consequent payment) of a debt evidenced by a federal judgment decided to be a nullity in *Wallace* v. *McConnell.* The case, however, has been cited on numerous occasions for those propositions, and other extensions of its actual holding. It was so cited in every case referred to by the Circuit Court (R. 77), except *Franklin* v. *Ward,* which was decided before the *Wallace* case.

Insofar as *Wallace* v. *McConnell* is construed to support the view that no state court can validly attach a debt and proceed to judgment thereon while the debt is in litigation in a federal court, it seems to have been overruled by *Kline* v. *Burke Construction Co., supra.* In that case this Court held that no interference or conflict of jurisdiction did or in fact could arise out of the circumstance that a federal

and a state court entertained jurisdiction of the same parties and the same cause of action at the same time. Each court is free to proceed in its own way, affected by the other court only insofar as notice of the latter's determinations is brought to it in the usual way, and then only as the facts and the rule of *res judicata* may require.

Mack v. *Winslow*, 59 Fed. 316 (C. C. A. 6th, 1893), was a suit of interpleader instituted by a judgment debtor (against whom judgment had been obtained in the Kentucky District Court), who had been garnished, before judgment in the District Court, in an attachment action in Ohio (against the plaintiff in the District Court). All of the parties were before the court and the plaintiff in the Ohio attachment action claimed a lien and consequent priority in the distribution of the funds in court. It does not appear that the law of Ohio was proved to recognize the validity of attachments of foreign judgments, and the Court applied its own rule, disallowing the attaching creditor's lien. The garnishee had not paid in Ohio and was not subjected to double liability. The District Court thought it unnecessary to decide whether the Ohio court had acquired jurisdiction over its nonresident defendant, but held that a debt *in suit* was not subject to attachment in a foreign court, citing *Wallace* v. *McConnell*, *supra*.

U. S. Shipping Board Merchant Fleet Corp. v. *Hirsch Lumber Co.*, 35 Fed. (2d) 1010 (App. D. C. 1929), is in no sense an authority against the petitioners, since the court was there performing its unquestionable duty of construing the attachment statute of the District of Columbia, to determine

whether under that law it should attach a judgment rendered in the District Court of Florida. It is not doubted that the District of Columbia courts, as well as the courts of every jurisdiction, have the power and right to interpret their own statutes and determine whether or not, in the light of the legislative policy there expressed, they will attach foreign judgments.

In *Wabash R. R. Co.* v. *Tourville*, 179 U. S. 322, it was contended that an Illinois attachment, and consequent payment, of a debt in litigation (and finally reduced to judgment) in Missouri, was not given full faith and credit by the Missouri courts. This Court held that the question was not adequately presented by the record, Mr. Justice McKenna saying that (p. 327):

> "* * * counsel has ably and fully discussed the law and effect of garnishment. We do not think it necessary to enter into that discussion as fully as counsel have. The judgment of the [Missouri] court of appeals was undoubtedly final. * * * The rule precludes in that state the adjudication of rights occurring subsequently to the rendition of the original judgment. [Citing Missouri case.]"

A motion was also made by the defendant (the garnishee in the Illinois proceedings) to quash the Missouri execution. As to the motion, the Court said (p. 327):

> "It is not clear from the opinion of the supreme court [*i. e.*, the Missouri decision from which appeal was taken] whether the lower court under the local procedure had as little power over the execution of a judgment as it had over the

judgment entered on the mandate of the court of appeals."

The opinion ends with a dictum on which respondent relies, that the ruling of the Missouri Supreme Court, holding that the Missouri judgment was not subject to garnishment in Illinois, was "sustained by the weight of authority."

Insofar as the *Tourville* case decided that the validity of the Illinois garnishment was to be determined by the general law, or the "weight of authority", rather than by the law of Illinois where the garnishment took place, we submit that it has now been overruled by *Erie* v. *Tompkins*.

In neither the *Tourville* nor the *Wallace* case did this Court decide that a judgment debtor's payment of a debt evidenced by a foreign judgment, under the compulsion of a state court attachment, valid under the laws of the state, should be regarded as a nullity upon the judgment debtor's motion to satisfy the judgment. The weight and effect to be given to such a payment in a foreign jurisdiction, necessarily depends upon the validity of the attachment proceedings which compelled the payment. Such validity, under the doctrine of *Erie* v. *Tompkins*, is to be found in the authority of the law of the state where the attachment took place. These principles were applied in *National Automatic Tool Co.* v. *Goldie*, 27 Fed. Supp. 399, 401; in *Lawley* v. *Whiteis*, 24 Fed. Supp. 698, 700, and in *Heydemann* v. *Westinghouse* (C. C. A. 2d), 80 F. (2d) 837, 840.

Nor is there any modern justification for the suggestion that the attachment interfered with the jurisdiction or prerogatives of the District Court. The

"federal rule", that would prohibit the attachment of federal judgments, is quite frankly of historical origin. (See *Thomas* v. *Wooldridge, supra; cf. Shinn* v. *Zimmerman,* 23 N. J. Law 150, 153, and *Burrell* v. *Letson,* 2 Speers (S. C.) 378.) "A debt recovered by judgment at Westminster cannot be attached under custom of London" (*Sir John Parrot's* case, Cro. Eliz. 63; *Kerry* v. *Bower,* Cro. Eliz. 186). These early opinions remind us that the jurisdictional rivalries and jealousies in the English courts of that day were far more personal and venomous than would be tolerable now. See *Drake on Attachments,* §620.

The common law rules are but roughly applicable, if at all, to the American attachment statutes (of great variety) in the several states. The courts in the majority of the states soon repudiated the English rule that their own judgments were not attachable (*Drake,* §624) and several saw no reason why the legislative policy expressed in the statutes was not broad enough to cover debts proved by foreign or federal judgments as well. (*Fithian* v. *New York & Erie,* 31 Pa. St. 114; *Knebelkamp* v. *Fogg,* 55 Ill. App. 563; *Fuller* v. *Foote,* 56 Conn. 341.)

Many judges have spoken very strongly on the unreality of this old contention that it was beneath the dignity of one court to give heed to the lawful process of another. The Supreme Court of Wisconsin said in *Jones* v. *St. Ouge,* 67 Wis. 520, at p. 524:

> "The garnishee process operated upon the parties, and not upon the circuit court. The order to pay was made after rendition of such judgment, and hence in no way frustrated the jurisdiction of that court."

And in *Fithian* v. *N. Y. & Erie R. Co., supra,* the Pennsylvania court said (p. 116):

> "We see no reason why a debt established by a judgment may not be attached. If the debtor in the judgment should be compelled to pay any part of it to satisfy a creditor of the plaintiff therein, the courts of New York have ample power to see that the amount so recovered be allowed as payment of the judgment *pro tanto.* The courts of this state would certainly give full effect to such a judgment against a garnishee."

Compare:

> *Luton* v. *Hoehn,* 72 Ill. 81, 82;
> *Fuller* v. *Foote, supra;*
> *Gager* v. *Watson,* 11 Conn. 168;
> *Calhoun* v. *Whittle,* 56 Ala. 138.

The more recent view is expressed in *Hardwick* v. *Harris,* 22 N. M. 394 (1917), in which the Supreme Court of New Mexico dealt with this question of interference in the following terms (p. 398):

> "In regard to the interference with the jurisdiction of one court by another of the same state if garnishment under these circumstances is to be allowed, we can see no merit in the argument. When a court issues its execution for the collection of the money judgment it furnishes to the judgment creditor a means of enforcing this judgment. The court is not interested in the collection of the judgment, but the judgment creditor is. If he is prevented from collecting the judgment under execution by reason of garnishment process served upon his debtor in an action against him, his hand is stayed, not the hand of the court. See Rood, Garnishments, sec.

146, and the Wisconsin and Illinois cases, cited *supra*. Besides, the execution of the judgment would not be stayed by the fact of the garnishment of the judgment debtor. It could not be stayed except upon application to the court issuing the execution. If the judgment is collected under the execution, this would furnish a good defense to the judgment debtor in the garnishment proceeding and could be set up in his answer. If the execution were not to be levied until after the garnishee had answered in the garnishment proceedings, he might ask leave to file a supplemental answer. If the execution were not served until after judgment was taken against the garnishee in the garnishment proceeding, he might obtain relief from the judgment by *audita querela*, or a motion in the nature of *audita querela*. There is no conflict between the jurisdictions of the two courts, as the process of neither can be controlled by the other.".

"There can be no question of judicial supremacy or of superiority of individual right," said this Court (*Kline* v. *Burke, supra*), discountenancing an asserted rivalry between federal and state courts. The modern treatment of such relations has uniformly been in terms of comity, recognition and cooperation (*National Automatic Tool* v. *Goldie, supra*; *United States* v. *Klein*, 303 U. S. 276, 281-2).

The State Court attachment in the instant case did not interfere with the District Court, as a matter of fact. The State Court applied its own substantive and procedural law to enforce Huron's personal liability. Such liability was evidenced by the judgment of the District Court, which was entitled to recogni-

tion in every state and could be made the basis of an action, as on a contract, in the State of New York (see Point II, p. 15, *supra*). Lincoln's right to enforce the obligation in New York was transferred (as a result of notice constituting due process) by operation of law to the plaintiff in the attachment proceedings, who was Lincoln's creditor in the State of New York. These circumstances, when duly proved as facts in the District Court, were matters that necessarily had to be dealt with by that court in determining whether its judgment was in fact satisfied and whether execution should issue. They did not deprive the federal court of power to deal with its own judgment or execution in such manner as justice required.

If Lincoln had voluntarily assigned its judgment, and such judgment had thereafter been satisfied in a foreign jurisdiction, either voluntarily or as a result of suit, that state of facts, if proved in the District Court, would have required the District Court to withhold execution and mark its judgment satisfied. But it would not be supposed that such facts, or the intervention of an assignee in any event, would constitute an unwarranted "interference" with the processes or jurisdiction of the federal court. No more should a transfer, by operation of the law of attachment in a valid state proceeding, be deemed an attempted intervention in the local affairs or administration of the court rendering judgment. It is submitted that these are not "matters governed by the Federal Constitution or by Acts of Congress" (R. 78) within any exception to the rule of *Erie* v. *Tompkins*.

The Circuit Court, reversing the District Court, seemed to regard the question of validity as involving a conflict, as if the New York attachment could be valid under New York law but invalid under federal

law. The conflict was then resolved in favor of the federal law, *i. e.*, by application of a general rule said to be paramount in the federal court and superior to the authority of the local law. The general federal rule is said to have the sanction of this Court (R. 78).

It is the position of the petitioners that the approval of this Court, if ever given to such a general rule, was at a time when the doctrine of *Swift* v. *Tyson* was followed here. That is no longer the situation. The validity of the New York attachment, as a fact to be considered in determining the motions in the District Court, was referrable to the law of New York, and the decisions of the New York courts. No general rule of federal law applied to that issue. The power of the federal court to determine the motions in accordance with its own law, upon the facts before it, is not questioned. The controlling facts here were the validity of the attachment, and the compulsion of the payment thereunder. Unless those facts were correctly found by application of New York law, the motion for satisfaction of judgment could not be, and under the Circuit Court opinion was not, correctly decided.

Cf. West v. *American Telephone & Telegraph Co.*, and
Fidelity Union Trust Co. v. *Field*,

both decided by this Court December 9, 1940.

POINT IV.

The District Court in deciding that its judgment was satisfied by Huron and that no judgment should issue against the Surety Company, correctly adjudged the issues before it and gave due weight under its own law to the facts proved, including the validity of the State Court proceedings and Huron's prior payment of the judgment debt pursuant thereto.

This case comes here on review of the Circuit Court's reversal of the action taken by the District Court on two motions. One was Huron's motion for satisfaction of the judgment of March 3, 1938 (R. 9 *et seq.*), and the other was Lincoln's motion for judgment against the Surety Company (R. 33 *et seq.*). These motions were duly authorized:

Federal Rules of Civil Procedure, Rule 69(a), which provides in part:

> "The procedure on execution, in proceedings supplementary to and in aid of the judgment and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable."

Idaho Code Annotated, Sec. 7-1113, providing in pertinent part:

> "Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment or make such endorsement, and upon motion the court may

compel it, or may order the entry of satisfaction to be made without it."

Tanner v. *Wood,* 13 Idaho 486.

Federal Rules of Civil Procedure, Rule 73(f), which provides:

> "By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known."

Federal Rules of Civil Procedure, Rule 43(e), which provides:

> "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

In its motion for a satisfaction of judgment, Huron set up partial satisfaction by reason of payment of the attorneys' lien (which is not disputed, R. 32-33) and payment of the balance, pursuant to the New York attachment proceedings (R. 9-31). Lincoln filed no answer to Huron's motion.

Lincoln's motion for judgment against the Surety

Company claimed the full amount of the judgment as on an independent liability. The Surety Company, however, filed its answer (R. 35 *et seq.*) claiming that it was liable as surety only to the extent that the judgment was not satisfied by Huron and alleging the same facts in defense as Huron had set forth in its motion for satisfaction.

On the motion, therefore, the District Court was called upon to determine the truth or falsity of the facts alleged and then to decide, under the law of the forum, the juridical effect of the facts found to be true.

The very existence and necessity of this procedure is proof that the state attachment proceeding had not, in any jurisdictional or real sense, interfered with the "power of the United States District Court created and governed by Acts of Congress" (R. 78), over its execution or its judgments.

The validity of the State Court attachment and Huron's payment thereunder, was the principal circumstance (factual in the District Court), upon which petitioners relied. On these issues the District Court found favorably to the petitioners (R. 59). Since these were not "matters governed by the Federal Constitution or by Acts of Congress" (R. 78), the District Court applied the New York law in making these findings, following the rule of *Erie* v. *Tompkins,* where this Court said that "the law to be applied in any case is the law of the state."

Upon finding that the State Court proceedings were valid, the effect to be given them by the District Court was then controlled by the *Constitution* and the *Acts of Congress*:

Constitution, Article IV, Sec. 1, which provides that

> "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Judicial Code and Judiciary Act, 28 U. S. C. A., Sec. 687, R. S. 905, the last sentence of which is

> "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state, from which they are taken."

Federal Judiciary Act of September 24, 1789 (28 U. S. C. A. §725) which provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Giving the proceedings of the State Court the faith and credit to which they were thus entitled, the District Court held on the record before it, and upon the law properly administered there, that Huron was justly entitled to a satisfaction of its judgment. The controlling principle was stated by this Court in *Harris* v. *Balk, supra,* at page 226:

> "It ought to be and it is the object of courts to

> prevent the payment of any debt twice over. Thus, if Harris, owing a debt to Balk, paid it under a valid judgment against him, to Epstein, he certainly ought not to be compelled to pay it a second time, but should have the right to plead his payment under the Maryland judgment."

And see *Drake on Attachment* (1885), in Section 716, where he says:

> "* * * as it is an invariable rule that the garnishee shall not be required to pay his debt twice, * * *."

This principle of justice is found in many places in Drake's treatise, for instance, again in Section 617:

> "It is an invariable and indispensable principle that a garnishee shall not be made to pay his debt twice."

In *Embree and Collins* v. *Hanna*, 5 Johns. (N. Y.) 101, *supra*, cited by this Court with approval in *Wallace* v. *M'Connell*, 13 Pet. 136, 151, Kent, *Ch. J.*, says (p. 102):

> "Nothing can be more clearly just than that a person who has been compelled by competent jurisdiction, to pay a debt once, should not be compelled to pay it over again."

And further in the opinion, in discussing the force of the rival claims of plaintiff against defendant in such situations:

> "Admitting the cases to stand equally in equity (and the claim of the debtor to protection who has been obliged to pay once, must be admitted to

be at least equal in equity) the interest of the defendant ought to be preferred."

Petitioners do not contend that payment under compulsion of foreign attachment necessarily in every case compels that the court protect the garnishee. If the facts make satisfaction of the judgment unjust in any case, the judgment creditor is not without remedy on a motion for satisfaction. As this Court pointed out in *Harris* v. *Balk, supra,* at page 227:

> "* * * if the garnishee were guilty of negligence in the attachment proceeding, to the damage of Balk, he ought not to be permitted to set up the judgment as a defense."

In the instant case, Lincoln filed no answer to the motion for satisfaction and raised no issue of negligence or fault on the part of Huron or want of liability to the Trust Company in the New York action. Nor did Lincoln appear in the State Court action, although it could have appeared specially to contest the jurisdiction as the *Shipman* case shows (see this Brief, p. 14). Lincoln gave no instructions to Huron, made no demands to oppose the attachment. No state of facts was asserted by Lincoln before the District Court, on which any claim of equity in its favor could be based.

On the record before it, the District Court, with full power to control its process, without interference or compulsion of any kind (except the obligation to do justice between the litigants), correctly held that the judgment was satisfied by Huron and that the Surety Company was thereby released of its obligation on its bond.

Conclusion.

The Circuit Court reversed these just judgments of the District Court. The Circuit Court's opinion did not question but in effect sustained the District Court's finding that the State Court attachment proceedings were valid where rendered and binding there, to the extent of the property attached, upon both Lincoln and Huron. Nevertheless, the Circuit Court refused to give effect to the New York law, basing its reversal on a federal rule of general law, contrary to the mandate of *Erie* v. *Tompkins*. Such ruling, if sanctioned here, would tend to take away from one who obeys his state's lawful commands, that protection to which he is rightfully entitled in all the courts of the United States.

Respectfully submitted,

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Appendix.

Certain Provisions of the New York Civil Practice Act Referring to Attachment Proceedings and Pertinent to this Case.

ARTICLE 25

Summons

§233. Service without the state in lieu of publication. In all cases when publication of the summons is ordered, service of the copy of the summons and complaint and of any accompanying notice required by rules by the delivery thereof to the defendant personally without the state is equivalent to notice by publication and deposit in the post-office. The service must be made by a resident or citizen of the state of New York, or a sheriff, under-sheriff, deputy sheriff, constable, bailiff or other officer having like powers and duties of the county or other political subdivision in which the service is made, or an officer authorized by the laws of this state to take acknowledgments of deeds to be recorded in this state, or an attorney and/or counsellor at law, solicitor, advocate or barrister duly qualified to practice in the state or country where such service is made, or by a United States marshal or a deputy United States marshal. Service without the state must be made and proof thereof must be filed within sixty days after the order is granted; otherwise the order becomes inoperative. Service without the state in lieu of publication is complete ten days after proof thereof is filed.

§235. Personal service out of the state without order. Where the complaint demands judgment that the defend-

ant be excluded from a vested or contingent interest in or lien upon a specific real or personal property within the state or that such an interest or lien in favor of either party be enforced, regulated, defined or limited, or otherwise affecting the title to such property. or where the complaint demands judgment annulling a marriage, or for a divorce, or a separation; or where it appears by affidavit filed in the action or as part of the judgment roll in such action that a warrant of attachment, granted in the action, has been levied upon property of the defendant within the state, the summons may be served without an order, upon a defendant without the state in the same manner as if such service were made within the state, except that a copy of the complaint must be annexed to and served with the summons, and that such service must be made by a person or officer authorized under section two hundred and thirty-three of this act to make service without the state in lieu of publication. Proof of service without the state without an order shall be filed within sixty days after such service. Service without the state without an order is complete ten days after proof thereof is filed.

ARTICLE 46

Arrest, Injunction and Attachment: General Provisions

§814. Order or warrant to which this article applies. An order or warrant referred to in this article means either an order for the arrest of a party, an order for a temporary injunction or a warrant of attachment against property.

§815. Application for order or warrant without notice. Except as otherwise specially prescribed by statute, an

application for such an order or warrant, either before or after the defendant's appearance in the action, may be made without notice.

§816. Proof on application or hearing. Proof of a sufficient cause of action or fact in support thereof or of any extrinsic fact, to entitle a party to such an order or warrant, or proof to support or oppose a motion to vacate the order or warrant or discharge a person from arrest, or discharge an attachment, may be made by affidavit and by such other written evidence as the rules permit.

§817. By whom order or warrant may be granted. Except as otherwise specially prescribed by statute, or rules adopted as provided in this section, any such order or warrant may be granted, in a proper case, either by the court in which the action is brought or a judge thereof or any county judge; * * *.

§818. At what time the order or warrant may be granted. The order or warrant may be granted to accompany the summons or at any time after the commencement of the action, but it may not be granted after final judgment, except as otherwise specially prescribed by statute.

§819. Security. Except where security is expressly dispensed with by statute, such an order or warrant shall not be granted unless the party applying therefor gives security for the protection of the party against whom or whose property the order or warrant is to be directed. Except where the security is especially regulated by statute, it shall consist of an undertaking with sufficient sureties. The undertaking shall be to the effect, and in the amount if any, prescribed by statute relating to the particular remedy.

§821. Order or warrant to recite the grounds therefor. The order or warrant must briefly recite the ground or grounds on which it is granted.

§825. Jurisdiction acquired from time provisional remedy granted. From the time of the granting of a provisional remedy, the court acquires jurisdiction and has control of all the subsequent proceedings. Nevertheless, jurisdiction thus acquired is conditional, and liable to be divested in a case where the jurisdiction of the court is made dependent by a special provision of law upon some act to be done after the granting of the provisional remedy.

ARTICLE 54

Attachment: When Allowed: Obtaining Warrant

§902. In what actions attachment of property may be had. A warrant of attachment against the property of one or more defendants in an action may be granted upon the application of the plaintiff, as specified in the next section, where the action is to recover a sum of money only, as a tax or as damages for one or more of the following causes:

1. Breach of contract, express or implied, other than a contract to marry.

* * *

§903. What must be shown to procure warrant of attachment. To entitle the plaintiff to such a warrant, he must show that a cause of action specified in the last section exists against the defendant, and, if the action is to recover damages for breach of contract, that the plaintiff is entitled to recover a stated sum, over and above all

counterclaims known to him. He must also show that the defendant

1. Is either a foreign corporation or not a resident of the state; * * *

§905. Service of summons, if warrant previously granted. If the warrant be granted before the summons is served, personal service of the summons must be made upon the defendant against whose property the warrant is granted, within thirty days after the granting thereof; or else before the expiration of the same time, service of the summons by publication must be commenced, or service thereof must be made without the state, as prescribed by law; and if publication has been, or is thereafter commenced, the service must be made complete by the continuance thereof.

§907. Terms of undertaking on obtaining warrant. The undertaking to be given on the part of the plaintiff, before the granting of the warrant, shall be to the effect that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs which may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least two hundred and fifty dollars.

§910. Contents of warrant; to whom directed. The warrant may be directed either to the sheriff of a particular county, or, generally, to the sheriff of any county. It must require the sheriff to attach and safely keep, so much of the property within his county, which the defendant has, or which he may have, at any time before final judgment in the action, as will satisfy the plaintiff's demand, with costs and expenses. The amount of the

plaintiff's demand must be specified in the warrant, as stated in the proofs on which the warrant was granted. Warrants may be issued at the same time to sheriffs of different counties.

ARTICLE 55

Attachment: Executing Warrant

§912. Manner of attaching property and duties of sheriff, generally. The sheriff must execute the warrant immediately, by levying upon so much of the personal and real property of the defendant, within his county, not exempt from levy and sale by virtue of an execution, as will satisfy the plaintiff's demand, with the costs and expsnses * * *.

§916. Levy upon cause of action, evidence of debt or claim to estate. The attachment may also be levied upon a cause of action arising upon contract; * * *.

§917. Method of making levy. A levy under a warrant of attachment must be made as follows: * * *

3. Upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same; or, if it consists of a demand, other than as specified in the last subdivision, with the person against whom it exists; or, if it consists of a right or share in the stock of an association or corporation, or interests or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or if it consists of a right or interest in an estate of a deceased person arising under the provisions of a will or under the provisions of law in case of intestacy, with

the executor or trustee under the will, or the administrator of the estate.

§918. Certificate of defendant's interest to be furnished. Upon the application of a sheriff holding a warrant of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate, under his hand, specifying the rights or number of shares of the defendant in the stock of the association or corporation, with all dividends declared or incumbrances thereon; or the amount, nature and description of the property held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.

§921. Inventory. The sheriff, immediately after levying under a warrant of attachment, must make, with the assistance of two disinterested freeholders, a description of the real property, and a just and true inventory of the personal property, upon which it was levied, and of the books, vouchers, and other papers taken into his custody, stating therein the estimated value of each parcel of real property attached, or of the interest of the defendant therein, and of each article of personal property, enumerating such of the latter as are perishable. The inventory must be signed by the sheriff and the appraisers; and, within five days after the levy, must be filed in the office of the clerk of the county where the property is attached.

ARTICLE 59

ATTACHMENT: PROCEEDINGS AFTER VACATION OF WARRANT OR DISCHARGE OF ATTACHMENT, OR AFTER JUDGMENT

§969. Satisfaction of judgment from attached property. Where an execution against property is issued upon a judgment for the plaintiff in an action in which a warrant of attachment has been levied, the sheriff must satisfy it as follows:

1. He must pay over to the plaintiff all money attached by him, and the proceeds of all sales of perishable property, or of any vessel or share or interest therein, or animals, sold by him, or of any debts, or other things in action collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

* * *

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

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